CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR CERTIORARI FILED JULY 3, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

INDEX.

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Proceedings in Probate Court	4	3
Will of William M. Greene	9	7
Exhibit "B"—Letter testamentary	14	12
General traverse	16	14
Argument and submission of case	17	14
Special findings of fact	18	15
Conclusion of law	20	18
Opinion of the court, Littleton, J.	20	18
Judgment	28	28
Proceedings after entry of judgment	28	28
Clerk's certificate (omitted in printing)	29	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1935.

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 42514

INDUSTRIAL TRUST COMPANY, and ORLAND S. GREENE, Executors of the Estate of William M. Greene, Claimants,

vs.

THE UNITED STATES OF AMERICA

I. PETITION—Filed Sep. 25, 1933

The claimants represent that they are respectively a banking corporation under the laws of the State of Rhode Island and a citizen of the United States; that William M. Greene departed this life testate on May 30, 1930, and was at and before the time of his death a citizen of the United States; that in and by the terms of the last will and testament of the said William M. Greene, which was duly admitted to probate in the Probate Court of the town of Westerly, Rhode Island, on July 8, 1930, claimants were made executors, as more fully appears from the exemplified copy of said will, hereto attached and made a part hereof and marked Exhibit A; that claimants accepted the trust imposed upon them by said last will and testament of the said William M. Greene, deceased, and qualified as executors and entered upon their duties as such and are now and ever since their appointment have been acting as such executors; that a duly authenticated copy of the record of the appointment of the claimants as such executors is attached hereto and made a part hereof and marked Exhibit B; that the claimant, Industrial Trust Company, is and at all times herein mentioned, was a corporation under the laws of the State of Rhode Island and located in the Internal Revenue [fol. 2] District of said state; and in accordance with the provisions of the Revenue Act of 1928, the claimants made an estate tax return for the said estate of William M. Greene, deceased, showing a tax liability of $24,168.27, which sum was paid to the Collector of Internal Revenue for the Rhode Island District; subsequently, by letter dated August 2, 1932, the Commissioner of Internal Revenue de-

manded a deficiency in federal estate tax amounting to $102,645.28. Under date of October 17, 1932, a closing agreement was executed by your claimants which was approved by the Under Secretary of the Treasury January 9, 1933. By this agreement it was determined that the proper tax was $128,197.73 subject to a credit of not to exceed eighty per cent for state, estate, inheritance, legacy or succession taxes lawfully paid, subject however, to the right of the taxpayer to file a claim for refund as to the tax involved by the inclusion of a $42,000.00 Equitable Life Assurance Society of the United States policy in the gross estate. The balance of the full amount of the tax, less the appropriate deduction for state, and succession taxes, was thereupon paid to the Collector of Internal Revenue for the Rhode Island District. Such policy was a paid-up policy on the life of the decedent, William M. Greene, payable to his wife, or, in the event of her death before the insured, to his three children or the survivor of them; or, in the event of their death before the insured, to his estate. The wife of the decedent predeceased him, but he was survived by his three children. He had no right under the terms of the policy or the by-laws of the company to change the beneficiary of such policy. He had no power either by the terms of the policy or by the regulations of the company to borrow upon the security of the policy or to surrender said policy for cash or any other consideration.

Claimants say that on November 3, 1932, they duly filed with the Collector of Internal Revenue for the Rhode Island District their claim for refund in the sum of $756.00 with [fol. 3] interest, being the excess of the sums paid over the true tax due from the claimants for the federal estate tax upon such estate; that said claim was in due form and as required by the law and the regulations of the Treasury Department; that the claimants thereby became entitled to an immediate refund of the said sum of $756.00 with interest; that nevertheless the Commissioner of Internal Revenue on August 23, 1933, by a letter bearing the symbols "MT-ET-C1-1367-Rhode Island Estate of William M. Greene, Date of Death—May 30, 1930," addressed to claimants, advised them that said claim was rejected in full, and subsequently the rejection of said claim was duly set forth in the schedule of the Commissioner. Claimants state that said claim was unlawfully and improperly rejected and that claimants

have not received any part of said principal sum or interest, or the benefit thereof by the way of credit or otherwise.

Wherefore claimants pray judgment against the United States of America upon the facts and law for Seven Hundred and Fifty-six Dollars ($756.00), together with interest thereon from date of payment and their reasonable costs and disbursements.

Charles P. Taft II, Attorney for Claimants.

Duly sworn to by C. D. Sheldon. Jurat omitted in printing.

[fol. 4] EXHIBIT "A" TO PETITION

At a meeting of the Probate Court of Westerly, R. I., held this 18th day of June, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that a certain instrument in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, is presented to this Court with a petition in writing signed by Industrial Trust Company, by James M. Pendleton, Manager of its Westerly Branch, praying that said instrument purporting to be the last will and testament and two codicils thereto of said William M. Greene may be proved and allowed and that letters testamentary on the estate of said deceased may be issued to it. Notice thereof having been given by advertisement in "The Westerly Sun" once each week for and during the fourteen days next prior to the day of the date of this meeting, which said notice is satisfactory.

Said instrument purporting to be the last will and testament of said William M. Greene is now read and Fannie T. Pierce Holt and Edward B. Coy, two subscribing witnesses to said instrument are present and being sworn testify, that they were present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be his last will and testament; that, they at the same time, at the request of the said William M. Greene, in his presence and in the presence of each other subscribed their names as witnesses thereto and that said William M. Greene was then of sane mind and more than twenty-one years of age.

Whereupon further consideration of the matter is continued nisi.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 5] At a meeting of the Probate Court of Westerly, R. I., held this 24th day of June, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that a certain petition in writing is presented to this Court, signed by Industrial Trust Company, by its attorneys, Huddy and Moulton, praying that a commission may issue to take the deposition of Burton P. Hollister, one of the subscribing witnesses to a certain instrument in writing purporting to be the last will and testament of William M. Greene, late of said Westerly, deceased; and the deposition of said Burton P. Hollister and Stella Willerding, the subscribing witnesses to a certain instrument in writing purporting to be the first codicil to said instrument purporting to be the last will and testament of said William M. Greene; and the deposition of George H. Warrington, a subscribing witness to a certain instrument in writing purporting to be the second codicil to said instrument purporting to be the last will and testament of said William M. Greene, and that said instruments may be annexed to said commission. Notice thereof having been given by advertisement in "The Westerly Sun" once for and during the seven days next prior to the day of the date of this meeting, which said notice is satisfactory.

Upon consideration thereof it is ordered and decreed that a commission be issued to Albert L. Russell, of Cincinnati, Ohio, to take the depositions of said Burton P. Hollister, Stella Willerding and George H. Warrington, and the Clerk of this Court is hereby directed to have photographic copies of said instrument purporting to be the last will and testament and two codicils thereto of said William M. Greene made, to be retained by him in the files of said Court duly certified, according to law.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 6] At a meeting of the Probate Court of Westerly, R. I., held this 1st day of July, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that the whole subject matter concerning the probate of a certain instrument in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, is by order of this Court continued to the 8th day of July, A. D. 1930, at 10 o'clock, A. M.

Attest: Everett E. Whipple, Probate Clerk.

At a meeting of the Probate Court of Westerly, R. I., held this 8th day of July, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that the certain instruments in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, together with a petition in writing signed by Industrial Trust Company, by James M. Pendleton, Manager of its Westerly Branch, praying that said instruments may be proved and allowed and that letters testamentary on the estate of said William M. Greene may be issued to it, is now again taken up. The deposition of Burton P. Hollister, taken before Albert L. Russell, by virtue of a commission heretofore issued to him, by this Court, having been duly returned by the said Albert L. Russell and it appearing therein that said Burton P. Hollister, one of the subscribing witnesses to said instrument purporting to be the last will and testament of said William M. Greene was present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be his last will and testament, and that at the same time at the request of said William M. Greene, in his presence and in the presence of Fannie T. Pierce and Edward B. Coy, the other sub-[fol. 7] scribing witnesses to said instrument, he the said Burton P. Hollister subscribed his name as a witness thereto, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of said Fannie T. Pierce and Edward B. Coy, said Burton P. Hollister subscribed his name as a witness thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the last will and testament of

said William M. Greene, and the same is approved, accepted, allowed and ordered to be recorded.

The depositions of said Burton P. Hollister and Stella Willerding, taken before Albert L. Russell, by virtue of commissions heretofore issued to him, by this Court, having been duly returned by the said Albert L. Russell, and it appearing therein that the said Burton P. Hollister and Stella Willerding, subscribing witnesses to said instrument purporting to be the first codicil to the last will and testament of said William M. Greene were present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be a first codicil to his last will and testament, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of each other subscribed their names as witnesses thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the first codicil to the last will and testament of said William M. Greene, and as such is allowed and ordered to be recorded.

The deposition of George H. Warrington, taken before said Albert L. Russell, having been duly returned by him, and it appearing therein that the said George H. Warrington, one of the subscribing witnesses to said instrument purporting to be the second codicil to the last will [fol. 8] and testament of said William M. Greene was present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be the second codicil to his last will and testament, and that at the same time at the request of said William M. Greene, in his presence and in the presence of Edward Colston, the other subscribing witness to said instrument, he the said George H. Warrington subscribed his name as a witness thereto, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of him the said George H. Warrington, said Edward Colston subscribed his name as a witness thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the second codicil to the last

will and testament of said William M. Greene, and the same is approved, accepted, allowed and ordered to be recorded. It is further ordered that letters testamentary on the estate of said William M. Greene be issued to said Industrial Trust Company, the executor named in said will, and Orland S. Greene, who is named in the second codicil of said will as co-executor with the Industrial Trust Company.

Said Industrial Trust Company and said Orland S. Greene before entering upon said trust are ordered and required to give their several bonds in the sum of Three Million Dollars without surety. This Court doth appoint Howard E. Thorp to take an inventory of all the goods, chattels, rights and credits which were of said William M. Greene and to truly and justly appraise the same according to the present value thereof.

This Court doth direct the Clerk of this Court to give notice of the qualification of said executors in "The Westerly Sun" once each week for three successive weeks.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 9] Will

I, William M. Greene, of the City of Westerly, and State of Rhode Island, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament:

1. I desire all my just debts to be paid.

2. I give, devise and bequeath to The Children's Home of Cincinnati, the sum of ten thousand ($10,000) dollars; to Clovernook Home for the Blind, or its Trustees, the sum of ten thousand ($10,000) dollars; to the Hospital of the Episcopal Church of the Diocese of Southern Ohio, commonly known as the Children's Episcopal Hospital, the sum of ten thousand ($10,000) dollars; to the Old Men's Home of Cincinnati, five thousand ($5,000) dollars; and to the Widows' Home and Asylum for Aged and Indigent Women, five thousand ($5,000) dollars, these two corporations commonly known as the Old Men's and Women's Home, located on McMillan Street, in the City of Cincinnati; to the Home for Incurables, the sum of ten thousand ($10,000) dollars. All the above charitable institutions are located in the City of Cincinnati, State of Ohio.

3. I hereby give, devise and bequeath to my son, Orland S. Greene my watch and chain and ring.

4. I give, devise and bequeath to my son, Milbury M. Greene, all my clothing.

5. If my chauffeur, B. Boelleke, and my gardener, R. Bocksteigel, are in my employ at the time of my death, I give, devise and bequeath to each the sum of one thousand ($1,000) dollars.

6. I hereby give to my daughter, Helen Greene Musgrave, the option of purchasing my property, located at 1840 Madison Road, Cincinnati, Ohio, together with the contents of the house and the garage, including the automobile, at a value to be placed upon the same by my executor, The Industrial Trust Company of Rhode Island. If my daughter [fol. 10] does not exercise the said option to purchase, within a reasonable time, then my son, Orland S. Greene, may purchase the said property upon the same terms. If my son, Orland, does not desire to purchase the said property, then my son, Milbury M. Greene, may purchase the said property upon the same terms. If either of my said children purchase the said property I hereby give, devise and bequeath the proceeds of the sale to my other two children share and share alike in fee simple. If none of my said children elect to buy the said property, then the contents of the house are to be divided among my said three children in such proportion and manner as my daughter, Helen, may decide. The balance of my said property located at 1840 Madison Road, Cincinnati, Ohio, both real and personal, I instruct my executor to sell as soon as conveniently can be done. The proceeds of the sale I hereby give, devise and bequeath to my three children in fee simple share and share alike.

7. I hereby give, devise and bequeath to the Industrial Trust Company of Rhode Island, the sum of thirty thousand ($30,000) dollars in trust, however, to pay the income of said fund in monthly installments during her natural life to my first wife's sister, Mrs. Marie D. Bennett, who now resides at the McCormick Apartment Building, 1133 Lincoln Avenue, Denver, Colorado. I here devise and bequeath the said sum of thirty thousand ($30,000) dollars to my three children in fee simple share and share alike and

instruct my trustee, The Industrial Trust Company of Rhode Island, to divide the said trust fund of thirty thousand ($30,000) dollars, upon the death of the said Mrs. Marie B. Bennett among my three children in equal shares.

8. Of the balance of my property I hereby made the following disposition:

A. I hereby give, devise and bequeath to The Industrial Trust Company of Rhode Island one-third of my property both real and personal and wherever situated, in trust, however, to pay the income for life to my son, Milbury M. [fol. 11] Greene, in quarterly installments. Upon his death to pay the income in quarterly installments to his wife, Gertrude Meehan Greene, during her natural life. If my son, Milbury M. Greene, should die leaving any children, I hereby give, devise and bequeath said one-third of my property in fee simple to his children. If my son, Milbury M. Greene, should die leaving no children, issue of his body, then I give, devise and bequeath the said one-third of my property in fee simple to my two children, Orland S. Greene and Helen Greene Musgrave, share and share alike. Inasmuch as I have advanced from time to time to my son, Milbury M. Greene, various sums of money amounting in all to more than fifty thousand ($50,000) dollars, I hereby direct that fifty thousand ($50,000) dollars be added equally to the shares of my two other children as hereinafter set forth.

B. I hereby give, devise and bequeath to my daughter, Helen Greene Musgrave, in fee simple one-third of my property both real and personal and wherever situated. To this one-third is to be added twenty-five thousand ($25,000) dollars, being one-half of the advancement to my son, Milbury M. Greene.

C. I hereby give, devise and bequeath to my son, Orland S. Greene, in fee simple one-third of my property both real and personal and wherever situated. To this one-third is to be added twenty-five thousand ($25,000) dollars, being one-half of the advancement to my son, Milbury M. Greene.

9. I hereby appoint the said The Industrial Trust Company of the State of Rhode Island, as Trustee and Executor of this my last will and testament. I hereby give to

the said Trustee and Executor power to sell any part or all of my estate in such manner and upon such terms as it may deem best and to reinvest the proceeds thereof and to give all necessary deeds, conveyances and bills of sale; this power can be exercised without any authority or order of court, and the purchasers of the same are not required to see the application of the purchase money. I further [fol. 12] request that said Trustee and Executor be not required to give bond, and that no appraisement of my estate be made.

In testimony whereof, I have hereunto subscribed my name at Westerly, Rhode Island, this fourteenth day of August, in the year of our Lord nineteen hundred and twenty.

William M. Greene.

Signed, sealed, declared and published as his last will and testament, by William M. Greene, in our presence, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Fannie T. Pierce, Address: Westerly, R. I.; Edward B. Coy, Address: Westerly, R. I.; Burton P. Hollister, Address: 1325 Union Trust Building, Cincinnati, Ohio.

Codicil

I, William M. Greene, of the City of Westerly and State of Rhode Island, being of sound and disposing mind and memory, do hereby make, publish and declare this to be a codicil to my last will and testament which was executed at Westerly, Rhode Island, on the fourteenth day of August, nineteen hundred and twenty.

(1) I hereby revoke all of Clause Number Two of said will, relating to gifts to certain charitable institutions located in the City of Cincinnati, Ohio, and I hereby ratify and confirm all the other clauses, items and provisions of said will.

(2) Inasmuch as my second wife may have a child and inasmuch as I have made provision for said child, I do not deem it necessary to make any further provision for the said child by my will.

In testimony whereof, I have hereunto subscribed my name at Cincinnati, Ohio, this 25th day of April, in the year of our Lord nineteen hundred and twenty-one.

William M. Greene.

[fol. 13] Signed, sealed, declared and published as a codicil to his last will and testament by William M. Greene, in our presence, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

Burton P. Hollister, Stella Willerding.

Second Codicil to Will of William M. Greene

I, William M. Greene, of the City of Westerly and State of Rhode Island, being of sound and disposing memory, do hereby make and declare this as and for a second codicil to my last will and testament which was executed at Westerly, Rhode Island, on August 14, 1920.

(1) I hereby affirm my said last will and testament dated August 14, 1920, and the first codicil thereto, dated April 25, 1921.

(2) I have made no provision in said will or said codicil dated April 25, 1921, or in this codicil, for any child which I may have by my second wife, Lillian Louise Greene, for the reason that I have made ample provision for any such child by the terms of an agreement with my said wife, Lillian Louise Greene, dated May 9, 1921.

(3) I hereby nominate and appoint my son, Orland S. Greene, as co-executor of my will with the Industrial Trust Company of the State of Rhode Island, with the same powers and duties as provided in said will for said Industrial Trust Company, and further direct that no bond be required of him as such executor.

In Testimony Whereof, I have hereunto subscribed my name at Cincinnati, Ohio, this 9th day of May, in the year of our Lord nineteen hundred and twenty-one.

William M. Greene.

[fol. 14] Signed, sealed, declared and published as a second codicil to his last will and testament by William M. Greene, in our presence, who, at his request and in his

presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

Edward Colston, George H. Warrington.

EXHIBIT "B" TO PETITION

Letter Testamentary

The State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

By the Probate Court of the Town of Westerly, in the County of —— (L. S.) Washington, and State aforesaid,

To Industrial Trust Company, of the City and County of Providence and State aforesaid, and Orland S. Greene, of the City of Cincinnati, County of Hamilton and State of Ohio, Greeting:

Whereas, this Court has this day proved, approved, allowed, and caused to be recorded, the Last Will and testament and two codicils thereto, of William M. Greene, late of said Town, deceased, wherein you are named as the Executors thereof, and you having accepted said trust, and given Bond as the law directs, are, by these presents authorized and empowered to recover, receive and take possession of, the estate whereof the said William M. Greene died, seized and possessed, and the same to administer, according to law, and to the provisions of said Last Will and Testament. For the performance and execution thereof, this shall be your sufficient warrant.

[fol. 15] Witness: Edward M. Burke, Esquire, Judge of the Probate Court of the Town of Westerly, this 8th day of July, in the year of our Lord one thousand nine hundred and thirty.

Everett E. Whipple, Clerk.

State of Rhode Island and Providence Plantations

Clerk's Office of the Probate Court of the Town of Westerly, in the County of Washington, in said State

I, Everett E. Whipple, Clerk of said Court, having, by law, the custody of the seal, and all the records, books, documents and papers of or appertaining to said Court,

hereby certify the papers hereto annexed to be true copies of papers appertaining to said Court, and on file and of record in said office.

In attestation whereof, I have hereunto set my hand and have affixed the seal of said Court, this 11th day of September, A. D. 1933.

Everett E. Whipple, Clerk.

State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

I, Edward M. Burke, Sole Judge of the Probate Court of the Town of Westerly, in the County of Washington, in said State, exercising probate jurisdiction, do hereby certify and make known unto all to whom these presents shall come, that Everett E. Whipple, who signed the annexed certificate, is the Clerk of said Court, duly elected and qualified, and has the charge and custody of the records, files and seal thereof; that the seal affixed to said certificate is the seal of said Court; that the signature to said certifi- [fol. 16] cate is the proper handwriting of said Everett E. Whipple, and that the attestation of Everett E. Whipple, Clerk, as aforesaid, is in due form.

In witness whereof, I have hereunto set my hand at said Westerly, this 7th day of September, A. D. one thousand nine hundred and thirty-three.

Edward M. Burke.

State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

I, Everett E. Whipple, Clerk of the Probate Court of the Town of Westerly, in the County of Washington in said State, do hereby certify and make known unto all to whom these presents shall come, that Edward M. Burke, who signed the annexed certificate, is the sole Judge of said Court, duly elected and qualified, and that the signature to said certificate is the proper handwriting of said Edward M. Burke, and that the attestation of said Edward M. Burke is in due form.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at said Westerly this 11th

day of September, A. D. one thousand nine hundred and thirty-three.

Everett E. Whipple, Clerk.

II. General Traverse—Filed Nov. 4, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

[fol. 17] III. Argument and Submission of Case

On May 8, 1934, this case was argued and submitted on merits by Mr. Charles P. Taft, 2nd, for plaintiffs, and by Mr. Guy Patten, for defendant.

[fol. 18] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**—Filed Feb. 4, 1935

Mr. Charles P. Taft, 2d, for the plaintiffs.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General Frank J. Wideman, for the defendant.

In determining the net estate of decedent for the purpose of estate tax, the defendant included in the gross estate the amount of $42,000 represented by an insurance policy on decedent's life, and, as a result of such inclusion, collected a tax of $756. The executors claim this was erroneous for the reasons that (1) the policy was surrendered by decedent for paid-up insurance without further provision for surrender; (2) the policy reserved no right in the insured to change the beneficiary; (3) there was no power in the insured either by the terms of the policy or the regulations of the company to borrow upon the security of the policy; and (4) the inclusion of the policy in the gross estate in view of the foregoing circumstances violates the due process clause of the fifth amendment to the Constitution.

The defendant insists that the decedent did not divest himself of all beneficial interest in the amount receivable under the policy; that he had and retained for the benefit of his assigns or his estate a substantial right, title, and interest which ceased by reason of his death, and that Congress possessed constitutional power to impose an estate tax upon the interest which ceased by reason of death.

Special Findings of Fact

1. Plaintiffs are the executors of the estate of William M. Greene, who died May 30, 1930, a resident and citizen of Rhode Island. May 29, 1931, they filed an estate-tax return showing a gross estate of $2,434,015.73 and deductions of $574,667.16, resulting in a net estate of $1,859,348.57 and a tax of $120,841.37. After taking a credit of $96,673.10 for State inheritance tax, the return disclosed a Federal tax of $24,168.27, which was paid May 29, 1931.

A life-insurance policy for $113,893.44 taken out by decedent on his own life in the Union Central Life Insurance [fol. 19] Company, and payable to Helen Greene Musgrave, Milbury M. Greene, and Orland S. Greene, children of decedent, was included in the gross estate in the return less $40,000 thereof, receivable by the beneficiaries and not subject to tax, which exemption of $40,000 was allowed by the Commissioner of Internal Revenue in his final determination of the estate-tax liability.

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society, was not included in the gross estate in the return filed by plaintiffs but was included by the Commissioner in his final determination, and this is the policy involved in this suit.

2. Upon final determination the Commissioner increased the gross estate to $2,480,550.43 and deductions were allowed of $539,464.50, resulting in a net estate of $1,941,085.93 and a net Federal estate-tax liability of $128,197.73. In this final determination the Commissioner included in the gross estate the paid-up policy of $42,000 referred to in finding 1.

October 17, 1932, a closing agreement in reference to the tax liability of the estate was executed by plaintiffs and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct

tax liability was $128,197.73, subject to a credit of not to exceed eighty per cent for state, estate, inheritance, legacy, or succession taxes lawfully paid and subject also to the following clause therein contained: "Whereas, said taxpayer hereby agrees to this determination, reserving, subject to statutory limitations, the right to file a claim for refund as to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society of the United States policy in the gross estate."

3. Thereafter, on November 1, 1932, upon allowance of the appropriate credits for State inheritance taxes, as provided in the closing agreement, plaintiffs paid the balance of the full amount of the tax of $1,471.28, together with interest thereon of $126.29.

November 3, 1932, plaintiffs filed a claim for refund for $756 and interest thereon on the ground that the Commissioner erred in including in the gross estate, in his determination of the estate-tax liability, the aforementioned paid-up life insurance policy on the life of the decedent in the amount of $42,000 because (1) the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy. It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the beneficiaries did not make the policy taxable. The claim for refund was rejected by the Commissioner August 23, 1933.

4. The policy of $42,000 was a paid-up policy at the time of the death of the decedent which had been taken out by the decedent upon his own life, and upon which premiums had been paid by him. The policy was dated March 2, 1892, and contained the following provisions:

"Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, [fol. 20] or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city of New

York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

"This policy becomes incontestable two years from its date of issue. It provides for a paid-up policy after three years. It grants freedom of residence, travel, and occupation after one year. It gives to William M. Greene a choice of six methods of settlement upon the completion of the tontine period, on the 2 March 1912, namely:

"I. The surrender of the policy for its full value (consisting of the entire reserve, amounting to $13,652, Thirteen thousand and six hundred and fifty-two dollars together with the surplus then apportioned by the society) either in 1, cash; 2, paid-up assurance; 3, a life annuity; or

"II. The continuance of the policy, and the withdrawal of the accumulated surplus, either in 1, cash; 2, paid-up assurance; 3, an annuity.

"H. B. Hyde, President.

"W. Alexander, Sec'y."

February 19, 1912, the decedent endorsed on this policy the following: "Surrendered as of Mch. 2, 1912, for its value in paid-up insurance."

The company, by its appropriate official, made the following endorsement on the policy March 4, 1912:

"Inasmuch as the premium due on March 2nd, 1912, has not been paid on the within policy it is hereby agreed and declared that in accordance with the wish of the assurant, this policy has become a paid-up policy of $42,000.00, forty-two thousand 00/100 dollars, without profits or participation in deferred or other dividends, and requiring no further payments, except for extraordinary privileges."

5. Jennie D. Greene, wife of the decedent, predeceased him, but he was survived by his three children, Helen Greene Musgrave, Milbury M. Greene, and Orland S. Greene, to whom the proceeds of the policy in the amount of $42,000 were paid upon the death of the decedent. The tax paid by the estate, because of the inclusion in the gross estate of the proceeds of the $42,000 policy in question, was $756.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The question for decision is whether the proceeds of a life-insurance policy may be included in the gross estate of the insured for the purpose of the estate tax imposed by [fol. 21] the Revenue Act of 1926 when the policy provides for payment to certain named beneficiaries, but, in the event of their death prior to that of the insured, then to the executor, administrators, or assigns of the insured, and when the policy is silent as to whether the insured might change the beneficiary, withdraw the cash-surrender value, or pledge the policy as security for a loan.

The insurance policy in question was taken out by the decedent on his own life March 2, 1892, and all premiums were paid by him. The policy contract as originally issued to the insured upon a written application by him was a life policy for $50,000 and gave the insured control over the proceeds and granted him certain privileges to change the contract to a paid-up policy. The privilege of accepting a paid-up policy for $42,000 was exercised by the insured in 1912. The policy provided that its proceeds should be paid at the death of the insured to his wife, if living, or if she should not be living, then payment should be made to his children, and, in the event both his wife and his children should predecease him, the proceeds should be paid to his assigns or to his estate. The policy did not expressly reserve the right in the insured to change the beneficiaries. He died May 30, 1930. At that time his wife had died but his children were living and the proceeds of the policy were paid to them.

The question upon which the decision in this case must turn is whether the provision of the policy that if the beneficiary named should predecease the insured the proceeds

of the policy should be paid to such other person as the insured might designate, or to his estate, requires the inclusion of the amount of the policy (the $40,000 exemption having already been allowed) in the decedent's gross estate under section 302 (g), Revenue Act of 1926. That section provides that the value of the gross estate of the decedent shall include the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, "to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Subdivision (h) of the same section makes the part quoted applicable whether the policy was taken out before or after the effective date of the Revenue Act of 1926.

We are of opinion that the amount of the policy in question was properly included in the decedent's gross estate for the purpose of determining the net estate subject to the tax. At the outset it should be observed that the language of the statute is very broad and by its plain terms includes all insurance taken out by the decedent on his own life irrespective of when taken out and, also, whether or not the insured retained unqualified control over the proceeds of the policy at all times after the contract was issued. It may well be that a life-insurance policy absolutely assigned or made payable to a beneficiary, his executors, administrators, or assigns would not constitute a part of the gross estate of the insured under the section in question, but with such a case we are not here concerned. The unequivocal language of the statute and the legislative history of the provision in question manifest an intent and purpose to reach the proceeds of all insurance taken out by the decedent upon his own life, allowing an exemption of $40,000 as to such insurance payable to specific beneficiaries where, in [fol. 22] cases like the one at bar, such insurance is payable to such person as the decedent may designate other than the original beneficiary named in the policy or to his estate in the event the first-named beneficiary predeceased the insured. The statutory provision in question first appeared as section 402 (f) in the Revenue Act of 1918 and has been

reenacted without change in all succeeding statutes.[1] In reporting the Revenue Act of 1918 the Ways and Means Committee said (H. Rep. 767, 65th Congress, 2d session, page 22):

"The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum."

The foregoing statement makes it clear that Congress incorporated this provision in the statute for the sole purpose of requiring the proceeds of all insurance, with the exception of the exemption specified, taken out by the de-

---

[1] Section 402 (f), Revenue Act of 1921; section 302 (g), Revenue Acts of 1924 and 1926.

cedent on his own life to be included in his taxable estate, although the insured or his executor has no direct control over insurance payable to a specific beneficiary so long as that beneficiary lives. A consideration of the nature of the tax further demonstrates the applicability of the statute to all insurance taken out by the decedent on his own life, qualified only by the exemption allowed, and also removes any doubt that may exist as to the validity of the provision in question. The estate tax is imposed upon the privilege to transmit or the transmission or receipt of property by death and rests upon the principle that death is the generating source of valuable property rights not theretofore possessed or enjoyed by the recipient. Knowlton v. Moore, 178 U. S. 41, 57; Chase National Bank v. United States, 278 U. S. 372. The question in every case is not [fol. 23] whether there has been a transfer, in the strict sense of the term, of property by death, but whether death has brought into being or ripened for the recipient of the donor's bounty valuable property rights not theretofore fully enjoyed. Tyler et al. v. United States, 281 U. S. 497. In the last-mentioned case the court said at pages 502 and 503: "A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way. The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

The tax is not limited to the transmission of property directly from the decedent, but includes, as well, property,

the completed transfer or the possession and enjoyment of, which relates to or is dependent upon the death of the decedent. Porter v. Commissioner, 288 U. S. 436; Chase National Bank v. United States, supra; Tyler v. United States, supra. Congress has from time to time expanded the bases for such taxation in furtherance and in aid of the purpose to reach inter vivos transfers which are mere substitutes for testamentary dispositions as well as actual transfers at death. It was in accordance with this principle and purpose that the section in question was enacted, and its history shows that Congress merely recognized the fact that insurance taken out by a decedent upon his own life, payable at his death, and for which he pays all premiums, bears such a close relationship to death, and the shifting of the economic benefits is so contingent and dependent upon the event of death, that the amount receivable is commonly regarded as a part of the estate which he leaves when he dies.

Plaintiffs insist that the rights of the beneficiaries named in the policy were vested and that nothing whatever passed to them upon the death of the insured. For the purpose of this case we think this statement is not entirely accurate. In the designation of the beneficiary we think the decedent did not divest himself (his estate) of all beneficial interest in the proceeds of insurance payable under the policy and his interest therein was not extinguished until his death. No absolute right was acquired by the beneficiary during the lifetime of the insured to the proceeds of the insurance. Such right was contingent upon the prior death of the decedent. This right passed under a contract to which the decedent was a party. Such interest as the named beneficiaries in this case had would have been wholly extinguished by their death prior to that of the insured, and, in such event, the proceeds of the policy would have been payable to such person as the insured might designate or to his [fol. 24] estate. We think it cannot be successfully contended that these contingencies were so remote as to take the case outside the provision of the statute for we cannot speculate upon whether a beneficiary will outlive the insured. A beneficial interest in the proceeds was reserved by decedent to his estate or his assigns, in case he survived the beneficiaries, and passed to his children only in the event they survived him and also his wife. So long, therefore, as the decedent lived it could not be known that the

beneficiaries named in the policy would receive the proceeds of the insurance. Whatever their interests, there was not a complete transmission of the proceeds or an absolute right thereto during the lifetime of the insured. His death was the indispensable event giving rise to or enlarging valuable property rights not theretofore possessed or enjoyed. In Klein et al. v. United States, 283 U. S. 231, the court said: "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare Tyler v. United States, 281 U. S. 497."

In Burnet v. Wells, 289 U. S. 670, the court pointed out that amendments had been made to the statute from time to time for the purpose of preventing avoidance of tax upon estates and, after citing various decisions in cases where various methods had been employed to avoid the estate tax, said at page 677: "In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition." And, again at page 679 the court said: "One who takes out a policy on his own life, after application in his own name accepted by the company, becomes in so doing a party to a contract, though the benefits of the insurance are to accrue to some one else. Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 177; Vance on Insurance, pp. 90, 91, and 108. The rights and interests thereby generated do not inhere solely in those who are to receive the proceeds. They inhere also in the insured who in cooperation with the insurer has brought the contract into being."

The case of Llewellyn v. Frick, 268 U. S. 238, cited by plaintiffs, is not in point here. That case held merely that section 402 (f) of the Revenue Act of 1918 was not retroactive and that the statute referred only to transactions taking place after its passage, and that the latter provision in the Revenue Act of 1924 making an equivalent provision applicable to transactions which took place prior to the

enactment of the act was an aid to the conclusion that the provision in the earlier act was not intended to be retroactive. It appears that the insurance policy involved in the Frick case reserved certain powers and options to the insured to change the policy, but the effect of these reserved powers was not considered by the court until the decision in Chase National Bank v. United States, supra. In the last-mentioned case the court was dealing with policies of insurance in which the insured reserved the power to change the beneficiary, and it was held that termination at death of the power of the decedent to change beneficiaries, with the consequent passing to the designated beneficiaries of all [fol. 25] rights under the policies freed from the possibility of its exercise, was the legitimate subject of a transfer tax. The question involved in the case at bar was not before the court in the the Chase National Bank case and was not discussed, and we find nothing in the opinion of the court contrary to our conclusion in the case at bar.

Art. 27, Regs. 70, as amended by T. D. 4331, XI-I C. B. 330, provides that all insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, "must be included in the gross estate where the decedent during the life retained legal incidents of ownership in the policies of insurance * * *." Following this provision certain examples are given as an indication of when the proceeds are to be included in the gross estate, but such examples were not intended to be exclusive. This regulation was continued in Art. 27, Regs. 80. And Art. 25 of such regulations provided that "the decedent possesses a legal incident of ownership if the rights of the beneficiary to receive the proceeds are conditioned upon the beneficiary surviving the decedent." We think these regulations are a proper interpretation of the statute.

The United States Board of Tax Appeals has held that the proceeds of a life-insurance policy taken out by the decedent on his own life and payable to designated beneficiaries, without express provision in such policies that the insured might change the beneficiary, are not includable in the gross estate of the decedent. Liebes v. Commissioner, 20 B. T. A. 731; Blood v. Commissioner, 22 B. T. A. 1000; Reed v. Commissioner, 24 B. T. A. 166; Parker et al. v. Commissioner, 30 B. T. A. 342; Reybine, Executrix, v. Commissioner, 31 B. T. A. 314. In all of the above cases, except

that of Reybine, Executrix, the proceeds of the policies involved were payable to the decedent's estate or to his assigns if the designated beneficiaries died prior to the death of the insured. In the Reybine case the insurance policy was unconditionally assigned to a trust which the insured had no power to revoke. That decision is therefore not in point here. In none of the cases cited above, except Parker et al. v. Commissioner, did the Board of Tax Appeals discuss the precise point raised in the case at bar. In the last-mentioned case the Board said: "The provision in the policy that in case of death of beneficiary prior to that of insured, the insurance would be payable to the executors, administrators, or assigns of the insured, is not sufficient to prevent the vesting in the beneficiary from being complete. No act of the insured could prevent the beneficiary from receiving the full $10,000 of insurance on his death. Her interest could be defeated only by her death prior to that of the insured." In our view the fact stated in the last sentence of the quoted statement from the Board brings a case, such as the one at bar, within the express language of the taxing act and discloses, we think, such an interest in the contract and its proceeds in the decedent as to justify the inclusion of the amount of the policy in the gross estate. For this and other reasons herein stated, we are unable to concur in the decisions of the Board, and also the decision to the same effect in Ballard v. Helburn (D. C. Ky.), decided January 4, 1934.

Plaintiffs next contend that if section 302 (g) of the Revenue Act of 1926 taxes the proceeds of a life-insurance policy, such as the one in question, it violates the due-process clause of the fifth amendment to the Constitution. [fol. 26] This contention seems to be based upon the proposition that title to the proceeds of the policy taken out by the decedent on his own life had completely vested in the beneficiaries named in the policy and that the inclusion thereof in the gross estate would be to measure the tax of the decedent by the inclusion of the property of another. We think this contention cannot be sustained for the reasons hereinbefore given. The Supreme Court has repeatedly sustained the power of Congress to impose death taxes. Knowlton v. Moore, supra; Edwards v. Slocum, 264 U. S. 61; Nichols v. Coolidge, 274 U. S. 531. And, in so doing, it has avoided any objection to such legislation being retroactive or affect-

ing vested interests upon the principle that such taxes are imposed upon "* * * not the interest to which some person succeeds upon a death, but the interest which ceased by reason of the death." The opinions in Tyler v. United States, supra, and Klein et al. v. United States, supra, were based upon this point. Since Knowlton v. Moore, supra, it has been settled that the power of Congress to impose death taxes, under whatever form or name it may adopt, rests upon the principle that death is the generating source upon which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." Knowlton v. Moore, supra, page 57. This principle was reaffirmed in Tyler v. United States, supra.

In the instant case, the rights of the decedent's children were contingent, in the first instance, upon the death of their mother who was named as the first beneficiary, and, in the next, upon the death of the decedent. The death of the wife of the insured removed the first contingency. We think there can be no distinction between the rights of the children, which were contingent upon their surviving their mother, and the rights of the decedent, which were contingent upon his surviving the children. Upon the death of the wife of the insured, the matter was then reduced to the provision that the policy was payable to the children or the decedent, depending upon which survived the other. Under the terms of the policy all were equal in character, hence they were equal under the taxing act. When the interests of the beneficiaries are stressed, a like emphasis must be laid upon the interest of the decedent. The position of plaintiffs appears to assume that the proceeds of the policy in question were payable to the beneficiaries named, their heirs, executors, or administrators, as was the case in the Central Bank of Washington v. Hume, 128 U. S. 195, cited by plaintiffs, but the policy in this case was not so payable. This marks the distinction between an interest completely vested in money payable in the future and an interest wholly contingent. If the interest is contingent and the contingency is death, then we think it is within the power of Congress to impose the tax in question. Klein et al. v. United States, supra; Tyler et al. v. United States, supra. The taxing act does not, we think, violate a vested interest

in such case for the reason that a contingent right can never become completely vested until the event occurs upon which it depends.

In Burnet v. Wells, supra, the court said, at pages 677 and 678: "The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases. • • • Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as [fol. 27] overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. Milliken v. United States, 283 U. S. 15, 24, 25; Reinecke v. Smith, supra. Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. Corliss v. Bowers, supra; Reinecke v. Smith, supra. Government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249, 268; Bromley v. McCaughn, 280 U. S. 124, 136." In further support of this contention plaintiffs cite May v. Heiner, supra, and McCormick et al. v. Burnet, 283 U. S. 784. In the first, which arose under section 402 (c) of the Revenue Act of 1918, the trust instrument transferred a life estate to one beneficiary and the remainder to the grantor's children, "their distributees or appointees." The court held the title in the latter had been definitely fixed by the trust instrument. In the second there was likewise no contingent reversion to the donor. An analysis of the trust instrument, which appears in the footnote to the opinion, discloses that upon the death of any beneficiary his share was payable as he might direct by will and in default thereof to his surviving issue, and

in default of surviving issue to the surviving beneficiaries. Under the terms of the trust the corpus could never be returned to the donor upon the death of any beneficiary. In the case of Nichols v. Coolidge, supra, also involving section 402 (c) of the 1918 Act, the deeds conveyed absolute title to the real estate with covenants of warranty. The trust instrument reserved a life estate to the grantor and provided that the interest of any beneficiary predeceasing the grantor should pass as provided by the statute of distribution in effect at the time of the death of such survivor.

In those cases the title of the beneficiary did not depend upon the death of the donor; there was a title sufficiently vested in the beneficiary to pass, at his death, to his heirs or assigns. This *dis-* distinction is fundamental when the character of the rights of the "other beneficiaries" in the instant case are considered. Untermyer v. Anderson, 276 U. S. 440, involved a gift fully consummated before the effective date of the Revenue Act of 1924 under which it was sought to be taxed.

Plaintiffs are not entitled to recover and the petition must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 28] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 14th day of February, A. D., 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover.

It is adjudged and ordered that the plaintiffs' petition be and the same is hereby dismissed.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On March 13, 1935, the plaintiffs filed a motion for new trial.

On April 8, 1935, the court entered the following order on said motion:

It is ordered this 8th day of April, 1935, that the plaintiffs' motion for new trial be and the same is overruled.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 39,767. Court of Claims. Term No. 213. Industrial Trust Company and Orland S. Greene, Executors of the Estate of William M. Greene, Petitioners, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1935. Term No. 213 O. T. 1935.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ, and that the case be assigned for argument immediately following No. 83.